

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
BARTELLS MATERIALS MANAGEMENT,  
INC.,

Appellant,

v.

PUGET SOUND AIR POLLUTION  
CONTROL AGENCY,

Respondent.

PCHB NO. 87-58

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER, the appeal of a notice and order of civil penalty for \$1,000 for purportedly violating regulations concerning removal of asbestos, at Sea-Tac Airport located in King County, came on for hearing before the Board on October 12, 1987 in Seattle, Washington. Seated for and as the Board were; Lawrence J. Faulk (Presiding), Wick Dufford and Judith A. Bendor. Pursuant to Chapter 43.21B.230 RCW, respondent elected a formal hearing. The matter was officially reported by Lesley Gray of Evergreen Court Reporting.

1 Respondent public agency appeared and was represented by its  
2 attorney, Keith D. McGoffin. Bartells Materials Management, Inc., was  
3 represented by Erik A. Jensen, General Manager.

4 Witnesses were sworn and testified. Exhibits were admitted and  
5 examined. Argument was heard. From the testimony, evidence, and  
6 contentions of the parties, the Board makes these

#### 7 FINDINGS OF FACT

##### 8 I

9 The Puget Sound Air Pollution Control Agency (PSAPCA) is an  
10 activated air pollution control authority under terms of the state's  
11 Clean Air Act, empowered to monitor and enforce emissions standards  
12 for hazardous air pollutants, including work practices for asbestos  
13 removal.

14 PSAPCA has filed with the Board certified copies of its  
15 Regulations 1 and 2, of which we take official notice.

##### 16 II

17 Bartells Materials Management, Inc., is a maintenance contractor  
18 located in Renton, Washington. They specialize in maintenance of  
19 commercial buildings. This particular case involves a contract to  
20 vacuum heating vents and ducts in the bagwell at Seattle-Tacoma  
21 International Airport in order to remove any asbestos-containing  
22 material that had fallen from the ceiling and supporting beams.

III

On October 16, 1986, Michael T. Rock, Project Manager for this asbestos project, completed and filed with PSAPCA a notice of intent to remove and encapsulate asbestos at Sea-Tac Airport. The notice advised of the proposed vacuuming of dust from ducts in 5,000 square feet of the bagwell area of the main terminal, between October 16 and the end of the year.

IV

On the morning of December 9, 1986, while completing an anonymous complaint inspection at Sea-Tac International Airport a PSAPCA inspector observed a "scissors lift" parked in the north bagwell area of Sea-Tac Airport approximately 15 feet west of column R5.6P against the west wall of the bagwell area. The "scissors lift" was in a down position enabling the inspector to see the floor of the lift. What appeared to be dry and friable asbestos material was observed on the floor of the "scissors lift". Nearby, the inspector also observed a "manlift" parked area adjacent to bagwell station No. 6. The metal grated floor of the "manlift" appeared to contain dry, friable asbestos material on the grate and stuck tightly in the holes of the grate. In addition, the inspector observed asbestos material on the floor of the bagwell where the lift was parked. The inspector then telephoned appellant company and talked to Mr. Mike Rock. Mr. Rock confirmed that the two units, namely the "scissors lift" and the

1 "manlift" had been utilized by appellant company during their contract  
2 for vacuuming of the loose asbestos material from the tops of the HVAC  
3 systems and ducts. The inspector took samples of the debris and  
4 photographs of the area. The samples were subsequently sent to the  
5 Department of Ecology (DOE) laboratory for analysis.

6 Following the incident appellant company took immediate steps to  
7 clean up all identified residue on the equipment and in the vicinity.  
8 When PSAPCA's inspector conducted a follow-up inspection that  
9 afternoon, the machines and area were found to be clear of the debris  
10 earlier observed.

11 V

12 On December 19, 1986, the DOE laboratory report was received which  
13 showed that the samples collected by the PSAPCA inspector contained  
14 chrysotile asbestos, ranging from 5% to 20%.

15 On December 29, 1986, PSAPCA mailed two separate notices of  
16 violation to Bartells Materials Management, Inc., for alleged  
17 violation of WAC 173-400-075 (Emission Standards for Sources Emitting  
18 Hazardous Air Pollutants) and Sections 10.04(b)(2)(iii)(A)(B)(C) and  
19 10.05(b)(1)(i)(IV) of PSAPCA Regulation I (Removal and Encapsulation  
20 of Asbestos Material). The notices gave the date and time of  
21 violation as December 9, 1986, at 9:57 a.m.

22 On February 20, 1987, PSAPCA mailed to appellant company a Notice  
23 and Order of Civil Penalty (No. 6639). The Notice assessed a penalty  
24 of \$1,000 for the same six alleged violations which are listed  
25

26 FINAL FINDINGS OF FACT,  
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separately on the earlier-issued notices of violation. The notice was received February 23, 1987. Feeling aggrieved by the penalty, the company filed an appeal with this Board, received March 18, 1987.

#### VI

Bartells Materials Management, Inc., operates in a five state area, and after over 200 jobs in the 18 months since the company was formed, this is the first citation they have received from a regulatory agency.

#### VII

The company maintains that the asbestos debris discovered at the "scissors lift" and "manlift" by PSAPCA's inspector was not the result of any act or omission by Bartell's.

They point out that the old asbestos coating of the bagwell ceiling and supporting beams is subject to vibration day and night from overhead baggage conveyor belts and large tow vehicles moving baggage. The continual vibration causes asbestos to flake off and fall on adjacent structures, duct work, and the floor. Bartell's was working the graveyard shift from 12 midnight to 6:00 a.m. But, here the time of violation was noted at 9:57 a.m., almost four hours after the company's workers had gone home, during which time the materials could have fallen.

The company notes that their work plan calls for sealing cleaned areas following vacuuming with a solution of "Vibresele" and water to

1 lock down any microscopic fibers which might remain. This process,  
2 they maintain, is routinely followed. Here there was no evidence of  
3 sealant use in the areas where the inspector found the  
4 asbestos-containing fragments.

5 On the shift the night of December 9, 1986, Bartell's personnel  
6 were working at the opposite end of the bagwell from where PSAPCA's  
7 inspector found the debris. The work they performed that night did  
8 not require the use of any lifts. Indeed, neither the "scissors lift"  
9 nor the "manlift" had been used by Bartell's for two weeks previous to  
10 that night.

11 The incident in question was the only incident of its type during  
12 Bartell's entire time on the job at Sea-Tac.

#### 13 VIII

14 Under all the facts and circumstances we are not persuaded that  
15 the existence of the asbestos fragments in the time and place they  
16 were found on December 9, 1986, is attributable to any act or omission  
17 of Bartell's.

#### 18 IX

19 Any Conclusion of Law hereafter determined to be a Finding of Fact  
20 is hereby adopted as such.

21 From these Facts, the Board comes to these  
22  
23  
24  
25

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters.  
Chapters 70.94 and 43.21B RCW.

II

We conclude that respondent agency has not carried their burden of  
proof for any of the alleged violations.

III

Any Finding of Fact which is deemed a Conclusion of Law is hereby  
adopted as such.

From these Conclusions, the Board enters this

ORDER

The Notice and Order of Civil Penalty (No. 6639) is vacated.

DONE this 28<sup>th</sup> day of March, 1988.

POLLUTION CONTROL HEARINGS BOARD

Lawrence J. Faulk 3/25/88  
LAWRENCE J. FAULK, Presiding

Wick Dufford  
WICK DUFFORD, Chairman

Judith A. Bendor  
JUDITH A. BENDOR, Member

I certify that I have let a copy of this hearing to the public.  
Filed for the public.  
3-28-88  
Judy M. Sarn

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW & ORDER  
PCHB NO. 87-58



BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

FRIENDS OF THE COLUMBIA, INC., )

Appellant, )

v. )

State of Washington, DEPARTMENT  
OF ECOLOGY, )

Respondent. )

PCHB No. 87-59

ORDER DENYING  
MOTION TO RECONSIDER  
DISMISSAL

On April 30, 1987 the Pollution Control Hearings Board ("Board") issued an Order dismissing appellant Friends of the Columbia, Inc., ("Friends") appeal, based on lack of jurisdiction.

Thereafter, on May 6, 1987, appellant lodged a letter with the Board asserting an array of legal theories in further support of its appeal. By letter filed May 14, 1987, appellant characterized this May correspondence as a motion or request to set aside the Board's Order of Dismissal. Respondent Department of Ecology ("Department") did not file a response to the Motion.

1 Having reviewed the entire file herein, the Board concludes that  
2 the Motion should be denied for the reasons set forth below.

3 1. Appellant asserts that the Board has jurisdiction to hear  
4 appeals from decisions of DOE, and that the Board is not just  
5 restricted to hearing appeals from orders (alone). Appellant further  
6 contends that the Board, therefore, has jurisdiction to hear  
7 appellant's appeal of the Department's acceptance for processing of a  
8 permit application for a proposed hazardous waste facility, arguing  
9 such acceptance constitutes a "decision". (Appellant does not contend  
10 that a permit has been approved or denied).

11 2. Appellant is correct in asserting that there may be appeals  
12 from both orders and decisions. RCW 43.21B.010. However, in the  
13 arena of appealable decisions, the Board is restricted to hearing  
14 appeals from the Department's issuance, modification, or termination  
15 of any permit or license or from decisions in contested cases, as  
16 defined in the State Administrative Procedures Act (APA") RCW  
17 34.04.010(3). That section states:

18 (3) "Contested case" means a proceeding  
19 before an agency in which an opportunity for a hearing  
20 before such agency is required by law or constitutional  
21 right prior or subsequent to the determination by the  
22 agency of the legal rights, duties, or privileges of  
23 specific parties. Contested cases shall also include  
24 all cases of licensing and rate making in which . . . a  
25 license is revoked, suspended, or modified, or in which  
26 the granting of an application is contested by a person  
27 having a standing to contest under the law or agency  
rules.

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27 MOTION TO RECONSIDER  
DISMISSAL  
PCHB No. 87-59

1           3. The Department's mere acceptance of a permit application for  
2 processing constitutes neither an order, nor a permit or license  
3 issuance, modification or termination, nor a "contested case" under  
4 the APA.

5           4. Appellant further contends that RCW 34.04.080 provides the  
6 Board with jurisdiction. RCW 34.04.080 states in pertinent part that  
7 if an agency issues a declaratory ruling, such ruling:

8                       "is subject to review in the superior court  
9                       of Thurston County . . . "

10           5. Even if such ruling had been issued, Superior Court, not the  
11 Board, has the immediate appeal jurisdiction.

12           6. Appellant further contends that WAC 173-303-845 provides  
13 jurisdiction for appeals of decisions to the Board. The statutory  
14 authority for this code provision includes Chapter 70.105 RCW, which  
15 provides at RCW 70.105.075 for appeals to the Board from "a compliance  
16 order or by any decision of the department regarding a compliance  
17 order in accordance with chapter 43.21B RCW." RCW 70.105.080 also  
18 provides for appeals to the Board of civil penalties. Lastly, RCW  
19 70.105.250 provides for appeals to the Board in regard to local  
20 planning requirements under RCW 70.105.220 or the designation of zones  
21 under RCW 70.105.22.

22           Appellant has not proven that any of the above necessary facts  
23 exist in this case, i.e. no appeal of a compliance order, civil  
24 penalty, local planning requirement or zoning designation. Hence WAC  
25

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27 MOTION TO RECONSIDER  
DISMISSAL  
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1 173-303-845 does not, as applied, support Board jurisdiction.

2 7. In the arena of solid waste siting, the Board has additional  
3 appeal jurisdiction under Chapter 70.95, when a jurisdictional health  
4 department has issued a permit pursuant to RCW 70.95.180 for the  
5 operation of a new or existing solid waste disposal site. The  
6 Department may appeal such a permit decision to the Board. RCW  
7 70.95.185. Such facts are, again, not presently before us.

8 8. Appellant appears to also be contending that the Board has  
9 jurisdiction to review the Department's rules under chapter 34.04 RCW,  
10 even if a contested case is not before us. Absent a contested case,  
11 the Board has no jurisdiction to review the validity of an extant DOE  
12 rule. Seattle v. DOE, 37 Wn.App. 819 (1984).

13 9. Alternatively, appellant appears to contend that its  
14 correspondence with DOE, on file in this appeal, is a petition to  
15 engage in rulemaking pursuant to RCW 34.04.060, and that DOE's failure  
16 to act on the petition constitutes a decision appealable to this  
17 Board. Appellant cites no legal authority in support of this  
18 conclusion. Absent statutory authority specifically granting  
19 jurisdiction, or necessarily implied by the statute, the Board does  
20 not have jurisdiction to hear appeals. Id. In addition, appellant  
21 has not proven that his numerous filings are, in fact, a petition to  
22 engage in rulemaking. The Department concluded (January 6, 1987  
23 letter) that appellant was petitioning to apply regulations already in  
24 place, not petitioning the Department to engage in ruling.

25  
26 ORDER DENYING  
27 MOTION TO RECONSIDER  
DISMISSAL  
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THEREFORE, the motion to reconsider or set aside is DENIED.

The Board further orders that the April 30, 1987 Order of Dismissal be modified at p.4 line 1 as underlined below:

"pollution control boards . . . RCW 43.21B.110 . . ."

DONE this 2<sup>nd</sup> day of June, 1987 in Lacey, Washington.

POLLUTION CONTROL HEARINGS BOARD

JUDITH A. BENDOR, Member

~~LAWRENCE J. FAULK, Chairman~~

WICK DUFFORD, Member

ORDER DENYING  
MOTION TO RECONSIDER  
DISMISSAL  
PCHB No. 87-59

1                                   BEFORE THE  
2                                   POLLUTION CONTROL HEARINGS BOARD  
3                                   STATE OF WASHINGTON

4                   FRIENDS OF THE COLUMBIA, INC.                   )

5                                   Appellant,                   )

6                                   v.                   )

7                   State of Washington                   )  
8                   DEPARTMENT OF ECOLOGY,                   )

9                                   Respondent.                   )  
10                   \_\_\_\_\_)

PCHB NO. 87-59

ORDER DISMISSING  
APPEAL

11                   On March 13, 1987, appellant Friends of the Columbia, Inc.,  
12                   ("Friends"), filed an appeal with the Pollution Control Hearings Board  
13                   ("Board"), from a series of actions of the Department of Ecology  
14                   ("DOE"), including DOE's acceptance for review of an application by  
15                   Rabanco and Environmental Security Corporation for a permit to operate  
16                   a hazardous waste facility.  
17  
18

1 In addition, on May 25, 1986, Friends petitioned DOE to alter its  
2  
3 procedures to allegedly conform to federal law regarding the  
4 acceptance of the application certification. Friends alleges that DOE  
5  
6 did not substantively respond to its petition until January 6, 1987.

7 Friends further requests that the Board waive the 30-day  
8  
9 requirements to appeal, and specifically prays for relief from the  
10 Board as follows:

11  
12 1. Require DOE to refuse to accept the hazardous waste facility  
13 application, and stop all processing of the application until it  
14  
15 applies to the Environmental Protection Agency ("EPA") to modify DOE's  
16 Hazardous Waste Management Certification Program and EPA acts thereon;

17  
18 2. Require DOE to act on Friends' petition or provide other  
19 relief requested in the petition;

20  
21 3. Require DOE to apply to EPA for such program modification; and

22 4. Require DOE to cease acting on the application until this  
23  
24 Board rules on this appeal.

1        There is no evidence in this record that the Department has issued  
2  
3        an Order denying or approving the application for the hazardous waste  
4        facility.

5        Appellant was advised by Board letter, June 1, 1987, that the  
6  
7        appeal would likely be dismissed for lack of jurisdiction, but that  
8  
9        written responses to the proposed dismissal would be accepted from the  
10       parties. Appellant Friends and DOE filed written responses.

11       Having reviewed the file herein, and being fully advised, the  
12  
13       Board concludes:

14       1. Timeliness of the appeal (i.e. within 30 days from DOE's  
15  
16       response to the petition) is not the key legal issue herein. Rather,  
17  
18       it is a question of ripeness for appeal to the Board, a statutory  
19       jurisdictional issue.

20       2. The Board is a quasi-judicial entity, created by statute,  
21  
22       which has jurisdiction "to hear and decide appeals from any person  
23  
24       aggrieved by an order issued by the Department [DOE] or by air



1 pollution control boards. . . " RCW 43.21B.100 (emphasis added), or as  
2 otherwise provided by statute, e.g. RCW 70.105.250. This limits the  
3  
4 Board to hearing contested cases as defined in the State  
5 Administrative Procedures Act, RCW 34.04.010(3). See Seattle v.  
6  
7 Department of Ecology, 37 Wn.App. 819, 883 P.2d 244 (1984). The Board  
8 has only that jurisdiction granted to it or necessarily implied.  
9

10 3. The Board does not have jurisdiction to hear appeals which  
11 challenge the application review procedure of DOE, when no order has  
12 yet been issued. Such assertion of jurisdiction would impermissibly  
13 interfere with the Department's exercise of its discretion. See  
14  
15 Peterson v. DOE, 92 Wn.2d 306, 596 P.2d 285 (1979).  
16

17 4. An appeal challenging DOE's rules themselves (rather than as  
18 applied through an Order) is akin to a declaratory judgment action,  
19 which is outside this Board's jurisdiction. Seattle v. DOE, supra.  
20  
21  
22  
23  
24  
25

1       5. The Board has jurisdiction to hear petitions for declaratory  
2       rulings regarding the applicability of rules as opposed to their  
3  
4       validity. WAC 371-08-240.

5  
6       6. Further, any interested party may petition the Board for  
7       promulgation, amendment or repeal of the Board's own rules. WAC  
8       371-08-245.  
9

10       7. Appellant's challenge in this case, however, is directed to  
11       the validity of DOE's rules. Such challenge is not within the ambit  
12  
13       of the aforecited WAC sections allowing petitions to this Board.

14  
15       8. The Board is without jurisdiction to consider appellant's  
16       requested appeal, since there is no order extant on appeal before the  
17       Board.  
18

19       If DOE were to issue a final order granting or denying the  
20       application for a hazardous waste facility, under current law such  
21  
22       order could be appealed to the Board. WAC 173-303-845.  
23  
24  
25

ORDER

THEREFORE, the appeal is DISMISSED.

DONE this 30<sup>th</sup> day of April, 1987.

POLLUTION CONTROL HEARINGS BOARD

Judith A. Bendor 4/29/87  
JUDITH A. BENDOR, Member

Lawrence J. Faulk 4/29/87  
LAWRENCE J. FAULK, Chairman

Wick Dufford  
WICK DUFFORD, Member